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Submitted with the Consent of the Parties

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-268

HYMAN RADZANOWER,

Petitioner,

VS.

TOUCHE ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SCHAFER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, L. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON, JACK WRATHER, THE FIRST NATIONAL BANK OF BOSTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE FIRST NATIONAL BANK OF CHICAGO

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TABLE OF CONTENTS

	PAGE
Consent of the Parties	1
Question Presented	2
The Interest of The First National Bank of Chicago	2
Summary of Argument	3
Argument:	
I. During the period in which Congress considered the Securities Exchange Act of 1934, it also considered carefully the unique role of national banks in the securities industry. A reading of the pertinent legislative history during the early 1930's shows a Congressional intention to broaden the special protections afforded to national banks and to the public based on the unique role of national banks in the economy, and not to repeal other special protections previously granted	4
II. The clear and manifest Congressional intention necessary to demonstrate the implied repeal *pro tanto* of 12 U.S.C. § 94 cannot be supplied by Petitioner's arguments, which are based on his conception of desirable policy	10
Conclusion	14
Consent of Respondent	Appendix A
Consent of Petitioner	Appendix B

TABLE OF CITATIONS

PAGE

Cases Cited:

Bruns, Nordeman & Co. v. *American National Bank & Trust Co.*, 394 F.2d 300 (2d Cir. 1968) 12, 13

Cook County National Bank v. *United States*, 107 U.S. 445 (1882) 8n.5

First Agricultural National Bank of Berkshire County v. *State Tax Commission*, 392 U.S. 339 (1968) 9

First National Bank of Charlotte v. *Morgan*, 132 U.S. 141 (1889) 10n.8

Investment Company Institute v. *Camp*, 401 U.S. 617 (1971) 6n.3

Mercantile National Bank at Dallas v. *Langdeau*, 371 U.S. 555 (1963) 13

Northside Iron & Metal Co. v. *Dobson & Johnson, Inc.*, 480 F.2d 798 (5th Cir. 1973) 13

Olberding v. *Illinois Central Railroad Co.*, 346 U.S. 338 (1953) 12, 13

Posadas v. *National City Bank*, 296 U.S. 497 (1936) .. 9

Red Rock v. *Henry*, 106 U.S. 596 (1882) 9

Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 11, 12

United States v. *Borden Co.*, 308 U.S. 188 (1939) 9

PAGE

Statutes Cited:

National Bank Act:

12 U.S.C. § 1 et seq. 3

12 U.S.C. § 24(7) 6

12 U.S.C. § 94 ..... 2, 3, 4, 5, 8, 9, 10, 12, 13

Sherman Act, 15 U.S.C. § 1 11

Securities Act of 1933, 15 U.S.C. § 77c(a)(2) 5

Securities Exchange Act of 1934, 15 U.S.C. § 78aa 2

28 U.S.C. § 1391(a) 12

Legislative History Cited:

H.R. Rep. No. 85, 73rd Cong., 1st Sess. 14 (1933) 5

H.R. Rep. No. 150, 73rd Cong., 1st Sess. 1 et seq. (1933) 7

S. Rep. No. 47, 73rd Cong., 1st Sess. 3-4 (1933) 6

S. Rep. No. 1455, 73rd Cong., 2d Sess. 155 et seq. 7

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE FIRST NATIONAL BANK OF CHICAGO

CONSENT OF THE PARTIES

This brief is filed by The First National Bank of Chicago, a national banking association organized under the laws of the United States (hereinafter referred to as "First Chicago") with the written consents of the parties, which have been filed with this Court and copies of which are attached hereto as Appendices A and B.

QUESTION PRESENTED

The fundamental issue to be decided in this case, one which clearly affects the interests of First Chicago, is:

> Whether the specific venue provision of the National Bank Act (12 U.S.C. § 94) enacted by Congress to facilitate the operation and administration of the national banking system by affording special protection to national banks prevails over the venue provision of the Securities Exchange Act of 1934 (15 U.S.C. § 78aa), which is not specific with respect to the defendant involved.

First Chicago submits that the issue presented should be decided on the basis of statutory interpretation, giving particular consideration to the applicable legislative history and to established judicial principles for determining repeal by implication, rather than on the basis of the general policy arguments propounded by Petitioner for favoring plaintiffs in securities cases.[1] The clear intent of Congress in carving out a special venue rule for national banks, based on the perception that such banks constitute a unique category of defendants, should not be nullified by Petitioner's notion of what is or is not in the public interest.

THE INTEREST OF THE FIRST NATIONAL BANK OF CHICAGO

First Chicago was chartered in 1863 and, measured by total deposits, is presently the ninth largest commercial bank in the United States. It makes loans to, accepts deposits from, and acts in a fiduciary capacity for, individuals, associations and corporations throughout the nation.

[1] E.g., Petitioner's Brief at 12.

First Chicago has a continuing interest in the administration of the National Bank Act (12 U.S.C. § 1 *et seq.*). In the recent past, First Chicago has been a party to numerous suits in both federal and state courts involving the application of 12 U.S.C. § 94. The application of 12 U.S.C. § 94 generally, as well as in the specific context of its apparent conflict with the venue provisions of the Securities Exchange Act of 1934 raised by this case, is of critical concern to commercial banks, such as First Chicago, located in the nation's financial centers.

Although First Chicago is not involved in the litigation between the parties, which arises in the context of a commercial loan transaction, a determination of the applicable venue statute in securities cases involving national banks has broad implications for such banks acting as trustees under corporate pension and profit-sharing plans and in other fiduciary capacities, as well as in other areas of banking activity. It is because of these broad implications that First Chicago respectfully requests this Court to consider the arguments presented herein.

SUMMARY OF ARGUMENT

The legislative history of the federal securities laws contains no evidence of the clear and manifest Congressional intention necessary to demonstrate implied repeal of the special national bank venue provision contained in 12 U.S.C. § 94. On the contrary, an examination of that history shows that Congress carefully considered the role played by national banks in securities transactions and acted specifically and forcefully to deal with the unique problems created by a national bank's securities dealings without modifying the venue provision of 12 U.S.C. § 94.

In the absence of a clear Congressional intention to repeal 12 U.S.C. § 94 this Court should not upset the comprehensive and unified system of national bank regulation on the basis of policy arguments founded on Petitioner's perception of a better procedural mechanism for handling substantive securities law problems. These arguments should be addressed to Congress.

ARGUMENT

First Chicago respectfully urges this Court to hold that the specific venue provision of the National Bank Act prevails over the venue provision of the Securities Exchange Act of 1934 for the reasons hereinafter set forth.

I.

During the period in which Congress considered the Securities Exchange Act of 1934, it also considered carefully the unique role of national banks in the securities industry. A reading of the pertinent legislative history during the early 1930's shows a Congressional intention to broaden the special protections afforded to national banks and to the public based on the unique role of national banks in the economy, and not to repeal other special protections previously granted.

Petitioner argues that, since the National Bank Act was enacted in 1864, when there was no regulation of securities, the venue provisions of the securities laws, which Congress enacted some seventy years later to regulate investment practices, should prevail over the earlier enacted venue provisions of the National Bank Act.[2] The implication of Petitioner's argument is that Congress ignored the role of national banks in the securities industry when it enacted the federal securities laws in the early 1930's, and that if

[2] Petitioner's Brief at 24.

Congress had considered national banks and the National Bank Act in connection with its adoption of comprehensive securities legislation during the early 1930's, it surely would have repealed 12 U.S.C. § 94. Because Congress did not in fact repeal 12 U.S.C. § 94, Petitioner argues that its repeal should be implied.

Such an implication cannot be inferred from an examination of pertinent legislative history during this period. Such an examination reveals that Congress was indeed scrutinizing the role of national banks in securities transactions, and that Congress acted expressly and specifically to deal with the unique problems which it perceived in securities transactions involving national banks. Evidence of this scrutiny and action is plentiful.

For example, in enacting the Securities Act of 1933, Congress exempted in the same clause both securities issued by national banks and securities issued by instrumentalities of the Government of the United States from the registration requirements imposed by Section 3(a)(2) of that Act (15 U.S.C. § 77c(a)(2)). The reason given by Congress for the exemption makes clear that Congress considered national banks to be unique entities with respect to securities transactions, as it did federal government instrumentalities:

> "Securities of instrumentalities of the Government of the United States are also exempted, as well as securities issued by a national bank or by a Federal Reserve bank. Securities issued by Government instrumentalities are not generally sold in the market while adequate supervision over the issuance of securities of a national bank is exercised by the Comptroller of the Currency." H.R. Rep. No. 85, 73rd Cong., 1st Sess. 14 (1933).

The rationale for this exemption of securities issued by national banks from the registration requirements is analogous

to the rationale for the special venue provision for national banks in that Congress deemed special treatment of national banks to be consistent with their unique nature. Further, the securities exemption indicates that Congress considered the national banking system when it enacted the federal securities laws. *See also* S. Rep. No. 47, 73rd Cong., 1st Sess. 3-4 (1933).

The Banking Act of 1933, commonly referred to as the Glass-Steagall Act, and its legislative history provide further evidence that Congress was attempting to complement the general securities laws with special restrictions on dealings by national banks in securities at the same time that it was considering the Securities Act of 1933. It did this by restricting the power of a national bank to purchase and sell securities for its own account or to engage in underwriting activities. *See* 12 U.S.C. § 24(7). Clearly, the Glass-Steagall Act demonstrates that Congress deemed national banks to have a unique position in the nation's financial system requiring special treatment under the securities laws.[3]

[3] This Court recently noted the special provisions which Congress enacted to regulate a national bank's securities dealings. In *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971), this Court held that the Glass-Steagall Act prohibited a national bank from establishing and dealing in participations in a pool of securities analogous to a mutual fund. This Court stated:

> "In sum, Congress acted to keep commercial banks out of the investment banking business largely because it believed that the promotional incentives of investment banking and the investment banker's pecuniary stake in the success of particular investment opportunities was destructive of prudent and disinterested commercial banking and public confidence in the commercial banking system. . . . The Glass-Steagall Act was a prophylactic measure directed against conditions that the experience of the 1920's showed to be great potentials for abuse." 401 U.S. at 634, 639.

The report submitted by Representative Steagall for the Committee on Banking and Currency of the House of Representatives on May 19, 1933 in support of the Glass-Steagall Act makes clear that the Act was intended to protect national banks and their depositors from the risks inherent in the speculative investment of bank funds. H.R. Rep. No. 150, 73rd Cong., 1st Sess. 1 et seq. (1933). It is apparent that during the depression days of the early 1930's Congress was considerably concerned with preserving a sound national banking system. The argument that Congress intended by its enactment of the Securities Exchange Act of 1934 partially to repeal by implication the National Bank Act venue provision with respect to national bank defendants in securities cases is inconsistent with the evidence of the legislative history, which indicates Congress' intent to afford additional protection to national banks in the national interest.

Further evidence of Congress' careful scrutiny of the role of banks in securities transactions is found in S. Rep. No. 1455, 73rd Cong., 2d Sess. 155 et seq. (1934), in which the Senate exhaustively examined the relationship between commercial banking and securities speculation with a view to determining the problems in this area which merited legislative reform. Nowhere in this report (or for that matter in any Congressional report issued during the early 1930's dealing with the securities industry or the relationship of banking thereto of which First Chicago is aware) was any intention expressed to limit the national bank venue provision to non-securities cases.

A review of the pertinent legislative history during the period under discussion confirms that Congress did indeed give serious consideration to the relationship of national banks with the securities industry, and that its intent was to

treat national banks as unique parties to securities transactions, requiring special protection. The main theme that runs through the Congressional reports is the protection of the banking public and the furtherance of the national interest in a sound banking system through safeguards specifically fashioned to regulate the investment and underwriting practices of national banks. This theme of protective legislation in connection with a national bank's security dealings was entirely consistent with the unique venue protection which Congress had earlier afforded national banks under 12 U.S.C. § 94. Both the bank securities legislation and the National Bank Act venue provision are based on a Congressional philosophy that national banks require special protection based on the unique role they play in the nation's economy.

Petitioner's argument[4] that implied repeal of the National Bank Act's venue protection is necessary to make the regulatory scheme of the securities laws work misses the point. The legislative histories of both the securities laws and the National Bank Act demonstrate an overriding Congressional concern that unique statutory protections were necessary to make the national banking system work.[5] Had Congress deemed partial repeal of the national bank venue provision consistent with this concern, it is reasonable to assume that somewhere in the long discourses con-

[4] Petitioner's Brief at 24.

[5] Petitioner characterizes the issue in this case as involving a conflict between 12 U.S.C. § 94 on the one hand and the entire substantive regulatory scheme of the Securities Exchange Act of 1934 on the other (Petitioner's Brief at 24). In fact, 12 U.S.C. § 94 is itself a part of a comprehensive statutory scheme dealing with national banks. As this Court stated in *Cook County National Bank* v. *United States,* 107 U.S. 445, 448 (1882):

> "We consider [the National Bank Act] as constituting by itself a complete system for the establishment and government of national banks . . . ."

tained in Congressional reports on these matters there would be some indication to that effect. There is none.

To find repeal by implication "[t]he intention of the legislature to repeal must be clear and manifest". *Red Rock* v. *Henry,* 106 U.S. 596, 602 (1882). See also *Posadas* v. *National City Bank,* 296 U.S. 497, 504 (1936) and *United States* v. *Borden Co.,* 308 U.S. 188, 198-199 (1939). When Petitioner argues, in the face of a legislative history which demonstrates that Congress specifically and thoughtfully considered the unique problems of national banks' securities activities, that Congress clearly and manifestly intended to repeal 12 U.S.C. § 94 by enacting the more general venue provisions of the Securities Exchange Act of 1934, he assumes a heavy burden indeed.[6] The legislative history outlined above compels a conclusion that Congress did not intend the securities laws to modify the National Bank Act except for the express additions to it made by the Glass-Steagall Act.

This conclusion is fortified by the record of the careful attention Congress historically has given to banking matters. In *First Agricultural National Bank of Berkshire County* v. *State Tax Commission,* 392 U.S. 339, 341, 345 (1968), this Court noted Congress' particularly active role in the banking area:

> "As will be seen, Congress has been far from reluctant to pass legislation in the banking field. There are important committees on banking and currency in both

[6] Petitioner's argument of implied repeal is based on Congressional silence. Petitioner's Brief at 16 states: "It is petitioner's contention at bar, that Congress' silence evidences its intent, in 1934, to impose the venue provisions of the 1934 Act on all involved, without excepting banks." Congressional silence falls far short of the clear and manifest intention to repeal required by the decisions of this Court to support a conclusion of implied repeal.

> Houses which continually monitor banking affairs and propose new legislation when changes are felt to be needed . . . . [T]his Court is asked to change what legislative history and prior decisions have established is the precise meaning of an Act of Congress. This we cannot do. For, as we pointed out above, the banking field has traditionally been an area of particular concern marked by legislation responsive to new problems."

II.

The clear and manifest Congressional intention necessary to demontrate the implied repeal *pro tanto* of 12 U.S.C. § 94 cannot be supplied by Petitioner's arguments, which are based on his conception of desirable policy.

Petitioner attempts to buttress his argument of implied repeal by urging nebulous policy considerations in support of his position.[7] This attempt must fail. Considerations of policy may not be substituted for the essential requirement that a finding of implied repeal must be based on a clear and manifest Congressional intent to repeal.[8] In the absence

[7] Two of the three points of Petitioner's argument dealing with the conflict between 12 U.S.C. § 94 and 15 U.S.C. § 78(aa), "Fundamental Fairness" and "Judicial Economy", are based on Petitioner's conception of desirable public policy. *See* Petitioner's Brief at 12-22 and 30-33.

[8] The only policy argument which Petitioner perceives in support of 12 U.S.C. § 94 is the need of a national bank to preserve its books and records at its principal place of business from the hazard of subpoena to remote jurisdictions (Petitioner's Brief at 16 and 24). This perception is derived from a sentence in the Court's opinion in *First National Bank of Charlotte* v. *Morgan*, 132 U.S. 141, 145 (1889). The sentence immediately following the sentence upon which plaintiff relies articulates a more significant consideration. Both sentences are quoted below:

> "This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts. [Citing cases] But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and, if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized." 132 U.S. at 144.

of a clear Congressional intention to repeal, this Court has been reluctant to imply repeal even when the conflict is between important substantive regulatory schemes. *A fortiori,* in the absence of clear Congressional intention, implied repeal may not be found in cases involving matters of procedure such as venue, especially where the venue provision against which the argument of implied repeal is asserted is a part of a comprehensive statutory scheme dealing with the specific type of entity for which a special venue privilege has been created.

In *Silver* v. *New York Stock Exchange* 373 U.S. 341 (1963), this Court considered a substantive conflict between the Securities Exchange Act of 1934 and the antitrust laws. The *Silver* case involved an order by the New York Stock Exchange to a number of its members to remove private telephone connections between the members' offices and the offices of non-members. The order was adopted under authority granted by the Securities Exchange Act of 1934. Compliance with the order constituted a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. §1). 373 U.S. at 347-348. Even in the case of direct substantive conflict between the Securities Exchange Act of 1934 and the earlier enacted antitrust laws, this Court was reluctant to find implied repeal. This Court stated:

> "The Securities Exchange Act contains no express exemption from the antitrust laws, or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and '[i]t is a cardinal principle of construction that repeals by implication are not favored.' *United States* v. *Borden Co.* 308 U.S. 188, 198; see

> *Georgia* v. *Pennsylvania R. Co.* 324 U.S. 439, 456-457; *California* v. *Federal Power Comm'n.* 369 U.S. 482, 485. Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. at 357.

The *Silver* case involved a direct conflict between two substantive regulatory schemes. The provisions of 12 U.S.C. § 94 in no way conflict with the regulatory provisions of the Securities Exchange Act of 1934. The venue provisions of both the National Bank Act and the Securities Exchange Act of 1934 merely establish the forum in which substantive obligations may be enforced. Applying the test adopted by this Court in *Silver,* implied repeal of 12 U.S.C. § 94 is not necessary to make the Securities Exchange Act of 1934 work. Giving full effect to the venue provision of the National Bank Act will have no impact at all on the substantive provisions of the securities laws.

As the court recognized in *Bruns, Nordeman & Co.* v. *American National Bank & Trust Company,* 394 F.2d 300, 304 (2d Cir. 1968), in holding that 12 U.S.C. § 94 determined venue for a national bank defendant in a securities case:

> "Here suit against the bank in Chicago is not impossible but simply inconvenient. Appellant's case thus does not measure up to the standards laid down in United States v. Borden & Co., 308 U.S. 188, 198-199, 60 S.Ct. 182, 84 L.Ed. 181 (1939), see also Silver v. New York Stock Exchange, 373 U.S. 341, 357, 83 S.Ct. 1246, 10 L.Ed. 2d 389 (1963), to justify a holding of repeal—even partial repeal—by implication."

Courts traditionally have declined to broaden the reading of venue statutes by implication to effect what may be perceived by some to be a more desirable policy result. For example, in *Olberding* v. *Illinois Central Railroad Co.,* 346 U.S. 338, 340 (1953), a case in which it was argued that defendant impliedly waived the venue protection afforded by 28 U.S.C. § 1391(a), this Court stated:

> "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction."

In the *Olberding* case this Court declined to imply the consent of a defendant to be sued in a district where he did not reside because the defendant committed a tort in that district. Likewise, this Court should not in the instant case imply the repeal of a venue statute which specifically and unambiguously bases venue on a party's status as a national bank.

The view that the plain language of venue statutes may not be modified by implication to make them compatible with changing conceptions of public policy has been reiterated by many courts in the specific context of 12 U.S.C. § 94. As this Court stated in *Mercantile National Bank at Dallas* v. *Langdeau,* 371 U.S. 555, 563 (1963):

> "The consequence of our decision, appellee says, is that a litigant will be unable to join two national banks in the same action in the state courts if they are located in different counties or in the federal courts if they are located in different districts. But aside from not being presented by these cases, such a situation is a matter for Congress to consider."

See also *Northside Iron & Metal Co.* v. *Dobson & Johnson, Inc.,* 480 F.2d 798, 800 (5th Cir. 1973) ("If the venue statute is to be amended or repealed, Congress is the body which must act to do so and the body to which appellants' argument should be addressed."); *Bruns, Nordeman & Co.* v. *American National Bank & Trust Co.,* 394 F.2d 300, 304 (2d Cir. 1968) ("Granted that the situation calls for a remedy, this lies in Congress. . . .")

Broad policy considerations may not be substituted for the requirement that implied repeal of a statute must be based affirmatively on a clear and manifest Congressional intention to repeal.

CONCLUSION

For the foregoing reasons, First Chicago respectfully submits that the judgment of the United States Court of Appeals for the Second Circuit affirming dismissal of the complaint in this action with respect to The First National Bank of Boston should be affirmed.

Respectfully submitted,

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December 2, 1975

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Radzanower v. Touche, Ross & Co., et al.
October Term, 1975
No. 268

Dear Mr. Yellon:

We are hereby writing on behalf of The First National Bank of Boston (the "Bank"), respondent in the above-captioned action, to confirm the Bank's consent to the filing on its behalf of an amicus curiae brief by The First National Bank of Chicago.

Enclosed please find a copy of a letter in which plaintiff's counsel consents to the filing of an amicus curiae brief by The First National Bank of Chicago.

A duplicate original of this letter and the original copy of plaintiff counsel's letter of consent have been transmitted to the Clerk of the Supreme Court.

Very truly yours,

Richard I. Janvey

Enclosure
cc: Stanley S. Stroup, Esq.
T. McLean Griffin, Esq.

APPENDIX B

DEBEVOISE, PLIMPTON, LYONS & GATES

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November 24, 1975

Ira Jay Sands, Esq.
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Radzanower v. Touche, Ross & Co., et al.
October Term, 1975
No. 268

Dear Mr. Sands:

In accordance with a telephone conversation I had with John Pickard, Esq. of your office, we are hereby requesting, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, your consent to the filing of amicus curiae briefs by The First National Bank of Chicago and The Chase Manhattan Bank, N.A. in the above-captioned action. These banks will be filing separate briefs.

We would appreciate acknowledgment of your consent in the space provided below.

Very truly yours,

Richard I. Janvey

Consent to

Ira Jay Sands